No. 89-700

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ASTROLINE COMMUNICATIONS COMPANY LIMITED PARTNERSHIP,
Petitioner,

v.

SHURBERG BROADCASTING OF HARTFORD, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF CONGRESSIONAL BLACK CAUCUS, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NATIONAL BLACK MEDIA COALITION, AND THE LEAGUE OF UNITED LATIN AMERICAN CITIZENS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Herbert H. Henderson
Acting General Counsel
Brian J. Carter
Assistant Ganeral Counsel
Willie Abrams
Assistant General Counsel
4805 Mt. Hope Drive
Baltimore, MD 21215
(301) 358-8900
Counsel for National Association for the Advancement of Colored People

David E. Honig*
1800 N.W. 187th Street
Miami, FL 33056
(305) 628-3600
Counsel for Congressional Black Caucus and the National Black Media Coalition

Eduardo Pena
1101 Fourteenth Street, N.W.
Suite 610
Washington, D.C. 20005
Counsel for League of United Latin American Citizens

*Counsel of Record

Of Counsel:

Squire Padgett
1628 11th Street, N.W.
Washington, D.C. 20001

Grant David Ward
Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Suite 500
Washingon, D.C. 20037

George W. Jones, Jr.
Verna L. Williams
Sidley & Austin
1722 Eye Street
Washington, D.C. 20006

Professor Robert Sedler
Wayne State University School of Law
468 W. Ferry
Detroit, MI 48202

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Rules and Statutes

Congressional Materials

Administrative Materials

Miscellaneous

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-322

ASTROLINE COMMUNICATIONS COMPANY,
Petitioner,

v.

SHURBERG BROADCASTING OF HARTFORD, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF CONGRESSIONAL BLACK CAUCUS, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NATIONAL BLACK MEDIA COALITION, AND THE LEAGUE OF UNITED LATIN AMERICAN CITIZENS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

The Congressional Black Caucus ("CBC") was formed in 1970 when thirteen Black members of the U.S. House of Representatives joined together to strengthen their efforts to address the legislative concerns of Black and minority citizens.

The vision and goals of the original thirteen members, "to promote the public welfare through legislation designed to meet the needs of millions of neglected citizens," has been reaffirmed through the legislative and political successes of the Caucus. The CBC is involved in legislative initiatives ranging from full employment, welfare reform, South African apartheid and international human rights, to minority business development and expanded educational opportunity. The CBC was also the originator and the petitioner for the rulemaking leading to the adoption of the distress sale policy.[1]

The National Association for the Advancement of Colored People ("NAACP") is the oldest and largest civil rights organization in the United States. It is a non-profit corporation with over 500,000 members and 2,300 branches and youth units throughout the country. The basic aims of the organization are to advance minority participation in all aspects of society and to destroy all limitations or barriers based upon race or color. The NAACP has long been involved in strengthening the machinery for combatting discrimination within the media and in maintaining the policies aimed at remedying societal discrimination and promoting diversity of broadcast programming.

The National Black Media Coalition ("NBMC") is the principal civil rights organization focusing on minority employment and ownership in the broadcast media. Since its founding in 1973, NBMC has participated in dozens of adjudicatory and rulemaking proceedings to vindicate and expand the FCC's minority ownership policies.

The League of United Latin American Citizens ("LULAC") is a sixty-year old national membership organization concerned with advancing the civil rights and promoting the educational, economic and social well being of Hispanic Americans in the United States. LULAC has actively promoted minority employment and minority ownership policies in the broadcast media before the FCC and the courts.

---

[1] Statement of Policy on Minority Ownership in Broadcasting, 68 F.C.C.2d 979, 983 (1978).

The District of Columbia Circuit invalidated the distress sale policy prescribed by Congress and implemented by the Federal Communications Commission ("FCC"). The policy in question is designed not only to remedy minority underrepresentation in broadcasting, stemming from past discrimination, but also to promote diversity of broadcast programming. Each of the *amici* is vitally interested in the policies implicated by the D.C. Circuit's decision in this case.[2]

SUMMARY OF ARGUMENT

Congress has determined that the distress sale policy is necessary to promote diversity of programming, an interest which is rooted in the First Amendment, and to avoid the perpetuation of the effects of prior state-sanctioned discrimination, in accordance with its broad powers to enforce the Fourteenth Amendment. H.R. Rep. No. 765, 97 Cong., 2d Sees. 40, 43 (1982). This Court has recognized that Congress, unlike any other governmental body, has the authority to act on the basis of such findings to remedy past societal discrimination. *Fullilove v. Klutznick*, 448 U.S. 448 (1980). Accordingly, in determining the constitutionality of the distress sale policy, Congress's choices as to both means and ends are entitled to deference.

The Court has found that policies which distinguish among individuals on the basis of race must survive strict scrutiny in order to be constitutional. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 720-723 (1989). In particular, the policy must further a compelling governmental interest and it must be narrowly tailored to achieve that goal. *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274 (1986). The distress sale policy fulfills both requirements and is, therefore, constitutional.

---

[2] Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. The letters of consent have been filed with the Clerk of the Court.

The distress sale policy first serves the compelling governmental interest in promoting diversity among broadcast licensees, which derives from First Amendment values. Congress and the Federal Communications ("FCC") have found that the public is best served by the "widest possible dissemination of information from diverse and antagonistic sources." The FCC, empowered by the Communications Act of 1934 to promote the public interest, has determined that the diversity of ownership is one means by which the listening and viewing public will be assured of receiving a broad spectrum of perspectives. As a result, the FCC's policy to encourage diversity is an integral part of the agency's regulatory framework. The distress sale policy is just one component of the FCC's overall objective to diversify broadcast licensees.

The distress sale policy also serves the compelling governmental goal of avoiding the perpetuation of prior state-sanctioned discrimination. Congress found that the paucity of minority broadcasters was directly related to legalized discrimination, which precluded their participation in the FCC licensing process. H.R. Rep. 765, 97th Cong., 2d Sess. 43 (1982). By the time this Court and the Congress had dismantled the legal barriers to minority presence in economic and political life, the broadcast industry had matured to such an extent that most television and radio frequencies, of which there is a limited number, had already been allocated. Furthermore, FCC regulations had provided broadcasters an expectancy in obtaining renewal of their licenses. As a result, the avenues for minority involvement in the industry were severely limited. The distress sale policy is thus one carefully circumscribed remedy designed to diminish the effects of a legacy of discrimination.

The distress sale policy is a narrowly tailored means to accomplish the goals of Congress and the FCC. It is utilized under very particular circumstances and specifically serves the vital governmental objectives described above. The Commission has the discretion to invoke the policy, which only occurs when a licensee decides to sell his station at distress prices, rather than go through a hearing. *Shurberg Broadcasting of Hartford, Inc. v.*

FCC, 876 F.2d 902, 950 (D.C. Cir. 1989) (Wald, C.J., dissenting). Thus, the policy is flexible unlike a rigid quota. Because the policy lessens the financial impediments to broadcast ownership, it is rationally related to the governmental objectives that justify its existence. In addition, the policy does not unduly burden nonminorities. A distress sale does not infringe upon a broadcaster's legitimate expectation to receive a license because "no one has a First Amendment right to (obtain one.)" *Red Lion Broadcasting v. FCC*, 396 U.S. 367, 389 (1969). In addition, the distress sale has resulted in the transfer of only thirty-eight stations to minority-controlled businesses in twelve years, or 0.28% of all broadcast stations in the nation. Accordingly, the governmental interests served by the distress sale policy and the limited nature in which it accomplishes those goals outweigh the minimal harm suffered by respondent.

ARGUMENT

CONGRESS MAY PRESCRIBE THE CONSIDERATION OF RACE IN THE TRANSFER OF BROADCAST LICENSES TO PROMOTE DIVERSITY OF BROADCAST LICENSEES AND TO AVOID THE PERPETUATION OF THE EFFECTS OF PRIOR STATE-SANCTIONED DISCRIMINATION

On three separate occasions, Congress has directed the FCC to maintain the distress sale policy originally adopted by the FCC in 1978.[3] The continuing resolution appropriating funds for the federal government for fiscal year 1988 provided (Pub. L. No. 100-202, 101 Stat. 1329 (1987):

> "That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue reexamination of, the policies of the Federal

---

[3] Pub. L. No. 100-202, 101 Stat. 1329 (1987); Pub. L. No. 100-459, 102 Stat. 2186, 2216-17 (1988); Pub. L. 101-10162, 103 Stat. 1020-1021 (1990).

> Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in Statement of Policy on Minority Ownership of Broadcast Facilities . . . and Mid-Florida Television Corp., . . ., which were effective prior to September 12, 1986, other than to close MM Docket No. 86-464 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry. . . ."

Congress reiterated this proscription for fiscal year 1989 and 1990. *See Shurberg*, 876 F.2d at 938 n.10 (quoting H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 40, 43 (1982)).[4] "Whatever its status at prior stages of this litigation, the distress sale program is today a deliberately chosen congressional policy, embodied in legislation passed by the House and Senate and signed by the President." *Id.*

---

[4] In 1982, Congress amended the Communications Act to authorize the FCC to employ lotteries in lieu of comparative license hearings, and specifically provided for special media ownership and minority ownership preferences. Specifically citing the FCC's 1978 Policy Statement, in which the FCC announced the minority distress sale policy, the Conference Committee concluded that:

> "[An] important factor in diversifying the media of mass communications is promoting ownership by racial and ethnic minorities - groups that traditionally have been extremely underrepresented in the ownership of telecommunications facilities and media properties. The policy of encouraging diversity of information sources is best served by not only awarding preferences based on the number of properties already owned, but also by assuring that minority and ethnic groups that have been unable to acquire any significant degree of media ownership are provided an increased opportunity to do so."

H.R. Conf. Rep. No. 765, 97th Cong. 2d Sess. 43 (1982).

A. When Congress Acts to Assure Full Minority Participation in the Mainstream of American Economic and Political Life, this Court May Invalidate its Action Only When it is Clear that the Means Chosen are Unrelated to the Stated Ends

A majority of this Court has determined that "strict scrutiny" is the appropriate standard of review whenever government action distinguishes among people on the basis of race.[5] The racial classification "must be justified by a compelling governmental interest," *Wygant v. Jackson*, 476 U.S. at 274 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)), and "the means chosen by the State to effectuate its purpose must be 'narrowly tailored to the achievement of that goal.'" *Id.* (quoting *Fullilove v. Klutznick*, 448 U.S. at 480.)

The Court has recognized, however, that Section 5 of the Fourteenth Amendment "is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Fullilove*, 448 U.S. at 476 (Burger, C.J.) (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)); *see Croson*, 109 S. Ct. at 719 (O'Connor, J.). For that reason, when Congress acts to assure full minority participation in the mainstream of American economic and political life, it is entitled to some deference with respect to its choices as to both means and ends. *See Fullilove*, 448 U.S. at 472, 483-4; *Id.* at 502-3, 510 (Powell, J.); *see also Croson*, 109 S. Ct. at 719 (O'Connor, J.). "[I]n no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce the equal protection guarantees." *Fullilove*, 448 U.S. at 483 (Burger, C.J.).

---

[5] *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 720-723 (1989); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 273-4 (1986) (Powell, J.); *Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980) (Burger, C.J.).

So long as the basis for Congressional action in this area is discernible, Congress need not compile an evidentiary record of the sort that might be required for judicial action. *Fullilove*, 448 U.S. at 463-67 (Burger, C.J.); *Id.* 448 U.S. at 503 (Powell, J.). Nor may this Court substitute its judgment for that of Congress as to the adequacy of the record. The Court "is bound to approach [its] task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power . . . 'to enforce by appropriate legislation, the equal protection guarantees of the Fourteenth Amendment.'" *Fullilove*, 448 U.S. at 472. Absent a substantial basis for concluding that the legislative judgment that affirmative steps to redress prior discrimination and assure the full participation of minorities in all aspects of American life was pre-textual, Congress's collective judgment should be sustained. The judgment of Congress should be sustained even if a majority of this Court might reach a different judgment as to the need for action on the basis of the available evidence.

When Congress directed the FCC to maintain the distress sale policy to assure increased diversity of expression in broadcasting through minority ownership of broadcasting facilities, Congress exercised both its broad power over interstate commerce under Article I, Section 8, and its equally broad power to advance racial equality under Section 5 of the Fourteenth Amendment. The objective of increasing racial diversity among broadcast licensees serves to implement both the First Amendment value of the "widest possible dissemination of information from diverse and antagonistic sources," *Associated Press v. United States*, 326 U.S. 1, 20 (1945), and the Fourteenth Amendment value of full participation by racial minorities, as licensees, speakers, and listener/viewers, in this very important aspect of American economic and political life. Congress's judgment as to both the need for affirmative efforts to increase minority participation in this area and the reasonableness of the distress sale policy as the means of achieving this important goal are amply supported and should be sustained.

B. The Distress Sale Policy Furthers the Compelling Government Objective of Diverse Broadcast Licensees

This Court has recognized the important First Amendment values at the core of the FCC's policies encouraging diversity of broadcast licensees. *See, e.g., FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 795 (1978): "[T]he 'public interest' standard necessarily invites reference to First Amendment principles, and, in particular, to the First Amendment goal of achieving 'the widest possible dissemination of information from diverse and antagonistic sources' . . ." (citations omitted).

Congress has both the power and responsibility to ensure that there is diversity in broadcast programming. Precisely because broadcast licensing involves the allocation of scarce frequencies, the government's interest in assuring diversity is directly related to the goals of the First Amendment:

> "the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech . . . and their collective right to have the [electronic media] function consistent with the ends and purposes of the First Amendment. It is the rights of the viewers and listeners, not the right of the broadcasters, which is paramount."

Red Lion Broadcasting Co. v. FCC, 396 U.S. at 390.[6] Thus, the distress sale policy is just one component of the FCC's much broader policy encouraging diversity to promote core First Amendment values. Moreover, the fact that the distress sale policy is intertwined with the FCC's regulatory framework militates against invalidating the policy. *See Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989)(upholding *Runyon v. McCrary*, 427 U.S. 160 (1976)). Less than one year after the distress sale policy was enacted, the FCC decided to dismantle its half-century-old regime of content-based broadcast regulation.[7] In deregulating radio (and later television), the FCC almost entirely abolished program content regulation, relying explicitly upon distress sales and other minority policies as its preferred means of fostering diversification of ownership and programming.[8] Thereafter, the FCC continued to introduce major

[6] Several FCC rules regarding ownership of stations were enacted for purposes of providing the public with diverse programming. *See e.g.*, Chain Broadcasting Rules, 3 Fed. Reg. 747 (1938), in which the Commission set forth the areas of concern regarding network ownership of radio stations. Even at that time, the FCC had concluded that ownership had an effect upon the programming received by viewers. The result of that assumption was a rule limiting network ownership of radio stations. *See also* 47 C.F.R. § 73.3555, the FCC's multiple ownership rule, which prohibits licensees from owning two radio or television stations whose service areas overlap; and 47 C.F.R. § 73.658(f), prohibiting network ownership of television stations in areas "where the existing television broadcast stations are so few or of such unequal desirability . . . that competition would be substantially restrained by such licensing."

These rules were enacted to increase competition among licensees by prohibiting a monopoly of ownership by any one group, and to thereby increase the variety of programs available to the public. *See Hudson Valley Broadcasting*, 13 Rad. Reg. (P&F) 49, 58-59 (1956) ("The plain intent of . . . Rule [73.658(f)] is to prevent ownership or substantial measure of control . . . as to restrain, through limitation of competition, the receipt by the public of a variety of . . . programs.") The nexus between diversity of ownership and diversity of programming has thus been an underlying assumption of the FCC diversity policy since its inception.

[7] In *Deregulation of Radio*, 73 F.C.C.2d 457, 482 (1979)(notice of proposed rulemaking), the FCC stated that "[e]fforts to promote minority ownership and EEO are underway and promise to bring about a more demographically representative radio industry."

[8] The FCC explained as follows:

new deregulatory initiatives, relying fully upon the assumption that its distress sale policy would be available to protect minorities in the media marketplace.[9] The D.C. Circuit has approved this policy decision.[10]

Thus, while the telecommunications revolution has burgeoned, the FCC has relied extensively on distress sales as a narrowly tailored means of diversifying broadcast ownership. Accordingly, the evisceration of the minority ownership policies will undermine the principal premise supporting the theory of broadcast deregulation. The FCC will thus be left with two

> [I]t may well be that structural regulations such as minority ownership programs and EEO rules that specifically address the needs of these groups is preferable to conduct regulations that are inflexible and often unresponsive to the real wants and needs of the public.

Deregulation of Radio, 84 F.C.C.2d 968, 1036, *recon. granted in part*, 87 F.C.C.2d 797 (1981), *aff'd in pertinent part sub nom., Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983). The FCC explicitly concluded that the minority ownership policies and EEO rules, rather than direct regulation of broadcast content, were preferable means to achieve diversification. *Id.* at 977. Indeed, under radio deregulation, if one station in a market is serving minorities, no other station in the market is required to do so, *id.* at 991, which is a dramatic departure from the regulatory structure that had been in place for at least a generation. *Compare En Banc Programming Inquiry*, 44 F.C.C. 2303, 2314 (1960) and FCC, *Public Service Responsibility of Broadcast Licensees* 15 (March 7, 1946)(the "Blue Book")(each station is expected to serve minority groups).

[9] *See Amendment of section 73.636(a) of the Commission's Rules (Multiple Ownership of Television Stations)*, 75 F.C.C.2d 587, 599 (1979)(separate statement of Chairman Ferris), *aff'd sub nom., NAACP v. FCC*, 682 F.2d 993 (D.C. Cir. 1982); *Implementation of BC Docket 80-90 to Increase the Availability of FM Broadcast Assignments, Second Report and Order*, 101 F.C.C.2d 638, *recon. denied*, 59 Rad. Reg.2d (P&F) 1221 (1985), *aff'd sub nom., National Black Media Coalition v. FCC*, 882 F.2d 277 (2d Cir. 1987); *Deletion of AM Acceptance Criteria in section 73.37(e) of the Commission's Rules*, 102 F.C.C.2d 548, 558 (1985), *recon. denied*, 4 F.C.C. Rcd 5218 (1989); *Nighttime Operations on Canadian, Mexican and Bahamian Clear Channels*, 3 F.C.C. Rcd 3597 (1988), *recon. denied*, 4 F.C.C. Rcd 4711 (1989).

[10] *NAACP v. FCC*, 682 F.2d at 1004 (holding that the FCC "ha[d] not improperly exercised its discretion by relying on [its minority ownership, employment and programming policies] rather than the Top-Fifty Policy, to advance minority goals.")

choices: to return to program content regulation, a direction which it has almost completely repudiated;[11] or to abstain from practically all regulation. Indeed, as the Second Circuit has noted, the elimination of such policies "might have an effect on the balancing interests undertaken by the FCC." *National Black Media Coalition v. FCC*, 822 F.2d 277, 284 (2d Cir. 1987).

Racial diversity in broadcasting is clearly related to "securing the public's First Amendment interests in receiving a balanced presentation" of views on diverse matters of public concern. *FCC v. League of Women Voters*, 468 U.S. 364, 385 (1984). In particular, racial diversity among the holders of broadcast licenses ensures that the viewpoints of racial minorities, in addition to the perspective on information and ideas that comes from the experience of being a minority person in America, are conveyed to the public at large, non-minority as well as minority.[12] Congress has acknowledged the public benefit resulting from increased diversity among licensees:

> The Congress has found . . . that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and improved service to minority and women audiences.

S.Rep. 182, 100th Cong., 1st. Sess. 76 (1989). As Judge Wald observed: "The distress sale policy rests on the assumption that viewers and listeners of *every* race will benefit from access to a broader range of broadcast fare, not that consumers will

---

[11] *See Syracuse Peace Council v. Television Station WTVH*, 2 F.C.C. Rcd 5043 (1987), *aff'd sub nom., Syracuse Peace Council v. FCC*, 867 F.2d 654 (1989), *cert. denied*, 110 S. Ct. 717 (1990).

[12] *See NAACP v. Federal Power Commission*, 425 U.S. 662, 670 n.7 (1976), in which this Court upheld FCC regulations prohibiting discriminatory employment practices, noting that the rules were "necessary to enable the FCC to satisfy its obligations under the Communications Act of 1934, to ensure that its licensees' programming reflects the tastes and viewpoints of minority groups." The Commissioner explicitly relied upon that reasoning in adopting the distress sale policy. *Statement of Policy on Minority Ownership*, 68 F.C.C.2d at 980.

inevitably gravitate towards programming disseminated by licensees of their own race." *Shurberg*, 876 F. 2d at 942 (Wald, C.J., dissenting).[13]

In adopting the distress sale policy in 1978, the FCC explicitly recognized the importance of minority broadcast licensees to the values underlying the First Amendment:

> "[W]e are compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media. This situation is detrimental not only to the minority audience but to all of the viewing and listening public. Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment."

Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d at 982.[14] Congress also has recognized the importance of increased minority broadcast licensees to core First Amendment values:

> "The underlying policy objective of these preferences is to promote the diversification of media ownership and consequent diversification of programming content. This diversity principle is grounded in the First Amendment . . . *Associated Press v. United States*, 326 U.S. 1, 20 (1945). Thus, in finding that the 'public interest, convenience and necessity' would be served by granting a given mass communications media license, 'the

---

[13] *See also supra* note 4.

[14] *See also Waters Broadcasting Co. Inc.*, 91 F.C.C.2d 1260, 1265 (1982), *aff'd sub nom. West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985) (minority ownership is "likely to serve the important function of providing a different insight to the general public about minority problems and minority views[.]").

> Commission simply cannot make a valid public interest determination without considering the extent to which the ownership of the media will be concentrated or diversified by the grant of one or another of the applications before it.'"

H.R. Rep. No. 765, 97th Cong., 2d Sess. 40 (1982).[15]

Diversity, as it embraces the values embodied in the First Amendment, is the ideal in this society.[16] *Cf. Univ. of Cal.*

---

[15] Indeed, because of the growing complexity of society, knowledge of other groups is increasingly based on perceived personal characteristics. Abramson, Misrucky and Hornung, *Stratification and Mobility* 9 (1976). When personal intergroup contact is absent or limited, media portrayals of members of other groups must instead serve the function of definition or confirmation of perceptions of other groups. Thus, when and if it addresses racial issues, media can be a powerful force reducing negative stereotyping. Scherer, *Stereotype Change Following Exposure to Counter-Stereotyping Media Heroes*, 15 Journal of Broadcasting 51 (1970). The power of the media to determine how group members know members of other groups is suggested by a classic study demonstrating that one quarter of young White viewers reported that "most of the things I know" about Blacks come from television viewing." Atkin, Greenberg and McDermott, *Television and Race Role Socialization*, 60 Journalism Quarterly 407, 414 (1983). Unfortunately, that information has frequently been negative, stereotypical, incomplete or inaccurate. *See, e.g.*, Roberts, *The Presentation of Blacks in Television Network Newscasts*, 52 Journalism Quarterly 50 (1975); Fife, *Black Images in American TV: The First Two Decades*, 6 Black Scholar 7 (November, 1974); Roberts, *The Portrayal of Blacks on Network Television*, 15 Journal of Broadcasting 45 (1970).

[16] The FCC has recognized that there can never be too much diversification in the mass media:

> [a] proper objective is the maximum diversity of ownership that technology permits in each area. We are of the view that 60 different licensees are more desirable than 50, and even that 51 are more desirable than 50. In a rapidly changing social climate, communication of ideas is vital. If a city has 60 frequencies available but they are licensed to only 50 different licensees, the number of sources for ideas is not maximized. It might be that the 51st licensee . . . would become the communication channel for a solution to a severe local social crisis. No one can say that present licensees are broadcasting everything worthwhile that can be communicated.

In the Matter of Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and TV Broadcast Stations, 22 F.C.C.2d 306, 311 (1970).

Regents v. Bakke, 438 U.S. 265, 314 (1978) (Powell, J.). Accordingly, the validity of the distress sale policies does not depend at all on statistical or other proof that the programming decisions of Black or other minority licensees will be controlled

by their personal tastes, rather than their markets.[17] Further, of course, the views of minority licensees may be identical to those of white male licensees on many issues of public policy. On other issues, however, the experience of being a minority in America

[17] Several studies do suggest, however, that the race of a broadcast licensee does have an effect upon programming. *See, e.g.*, The Congressional Research Service, *Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus?* (1988). Data collected by the FCC from nearly 9,000 of its 12,101 television and radio stations, indicated that there is a strong correlation between minority ownership and programming targeted to minority audiences. While only 20% of stations without any Black ownership responded that they provide programming directed to Black audiences; 65% of stations with Black ownership said that they did so. Only 10% of stations without Hispanic ownership responded that they provided Hispanic programming, while 59% of stations with Hispanic owners did so.

This study was consistent with the results of four other studies addressing the same question. Johnson, Media Images of Boston's Black Community, (Jan. 28, 1987) (available at the William Monroe Trotter Institute, University of Massachusetts at Boston) (unpublished manuscript), (examining treatment of over 3000 local news stories by white and Black-owned media and finding statistically significant differences in racial identifications and positive or negative treatment of certain types of stories); Fife, The Impact of Minority Ownership on Broadcast News Content: A Multi-Market Study, (1986) (available at the Department of Telecommunication, Michigan State University) (unpublished study) (concluding that minority owned television stations had statistically significantly higher representation of Blacks on newscasts than did comparable non-minority owned stations); Jeter, "A Comparative Analysis of the Programming Practices of Black-Owned, Black-Oriented Radio Stations and White-Owned, Black-Oriented Radio Stations," Ph.D. Dissertation, University of Wisconsin, 1981 (finding that Black-owned radio stations had statistically significantly more diverse playlists, featuring jazz, rock, blues, gospel formats, e.g., than did white-owned, Black-oriented stations); Honig, "Relationships among EEO, Program Service, and Minority Ownership in Broadcast Regulation," *printed in Proceedings of the Tenth Annual Telecommunications Policy Research Conference* 85, 87-88 (1983) (finding, for example, that in Black oriented stations, 72% of management employees at Black owned stations were Black but 38% of management employees at White owned stations were Black).

Of course, it would be stereotyping to suggest that all minorities *should* only target their programming towards their respective groups, or that all minorities would even desire to do so. However, the evidence clearly shows that minority broadcasters *do* make special efforts to serve those members of their own racial group.

may produce significantly different perspectives.[18] Diversity assures that on those occasions when there are differences of perspective, the voices of minorities will be heard distinctly, and

[18] One aspect of this qualitative difference in perspective was noted by the National Advisory Commission on Civil Disorders in 1968:

> "The media report and write from the standpoint of a white man's world. The ills of the ghetto, the difficulties of life there, the Negro's burning sense of grievance, are seldom conveyed. Slights and indignities are part of the Negro's daily life, and many of them come from what he calls the 'white press' - a press that repeatedly, if unconsciously, reflects the biases, the paternalism, the indifference of white America. This may be understandable, but it is not excusable in an institution that has the mission to inform the whole of our society."

National Advisory Commission on Civil Disorders, *1968 Report* 203 (1968).

As Professor Harvey Levin explains, " minority tastes become a public interest to be protected because there are so few stations catering to them, and because there is no widely used pay mechanism to register the viewer's intensity of desire and consumer surplus." Levin, *Fact and Fancy in Broadcast Regulation*, 47-48 (1980); *see also* Glasser, *Competition and Diversity among Radio Formats: Legal and Structural Issues*, 28 Journal of Broadcasting, 127, 130 (1984); Owen, *Economics and Freedom of Expression* 114 (1975); Noll, Peck and McGowan, *Economic Aspects of Television Regulation* 49 (1974).

not as edited or screened by white males,[19] to the benefit of all participants in the debate.[20]

C. The Distress Sale Policy Furthers the Compelling Objective of Avoiding the Perpetuation of Prior Discrimination

Professor Bickel is certainly right that "[t]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society."[21] The fact remains, however, that the distribution of radio and television broadcast licenses today is

---

[19] This concept translates into the journalistic environment as "agenda setting," a role played by the mass media and other social forces to build public consensus on the relative priorities in importance of various public issues. *See* McCombs and Shaw, *The Agenda-Setting Function of Mass Media*, 36 Public Opinion Quarterly 176 (1972). The Commission has long recognized the significance of agenda setting in the context of diversification of information. *See, e.g., Deregulation of Television*, 98 F.C.C.2d 1076, 1094 n. 61 (1984) ("we believe our action today will serve to increase the number of issues placed on the public's agenda, thereby advancing the fundamental goal of diversity.") The "agenda priorities" for public issues are quite different as between minorities and non-minorities. *See, e.g.*, Gallup Report on Political, Social and Economic Trends No. 185 at 29 (February 1981) (59% of Blacks and 17% of Whites "favor busing children to achieve a better racial balance in the schools"); Gallup Report Nos. 256-257 (January/February, 1987) at 22 (When asked "how well do you think Blacks are treated in this community -- the same as Whites are, not very well or badly?", 54% of Blacks and 27% of Whites responded "not very well" or "badly.")

[20] Communications scholars almost universally agree that minority media professionals do, in fact, bring greater awareness and sensitivity to minority issues, problems and concerns to their jobs. *See*, J. Fred MacDonald, *Blacks and White TV* (1983); B. Rubin, *Small Voices and Great Trumpets* (1983). Indeed, the Black press, which is 100% Black-owned, has always viewed addressing Black community needs as its major function and reason for existing. *See, e.g.*, Wolseley, *The Black Press U.S.A.* 17-21 (1971); Collier, *The Black Press in America: A Powerful Force Defined*, The American Press 14 (1945); Myrdal, *An American Dilemma* 911 (1944); Detweiler, *The Negro Press in the United States* (1922).

[21] *Croson*, 109 S. Ct. at 735 (Scalia, J.) (quoting A. Bickel, *The Morality of Consent* 133 (1975)).

the product of a system of state-sanctioned preferences favoring white males.[22]

The evidence that state-sanctioned racial discrimination prior to and after *Brown vs. Board of Education*, 347 U.S. 483 (1954) (Brown I) seriously impaired the ability of Black Americans to participate fully in the economic and political mainstream of American life has been chronicled in this Court's opinions and elsewhere.[23] There can be no serious dispute that state-sanctioned racial discrimination affected the ability of minorities to compete for broadcast licenses awarded by the FCC both before and after *Brown I*.[24] Yet, the FCC policies for awarding broadcast licenses ignored the effects of prior discrimination on the ability of minorities to compete for licenses until 1978. In the meantime, however, most licenses had been awarded to white males. Thus, as of the end of June 1973, licenses for 765 (66.6%) of the 1,149 commercial television stations that existed in mid-1989 had already been awarded. As for VHF stations, 521 (91.4%) of the 570 authorized today had been licensed by the middle of 1973. Of the 10,209 AM and FM radio stations authorized by the FCC as of the middle of 1989, 6,994 (68.5%) had been handed out by the middle of 1973,

---

[22] For the first 150 years of this nation's history, this Court explicitly approved discrimination against Black Americans and other minorities, and, more important, in favor of white males. *See, e.g., Plessy v. Ferguson*, 163 U.S. 537 (1896); *Hernandez v. Texas*, 347 U.S. 475 (1954); *Scott v. Sandford*, 60 U.S. (19 How.393 (1857). This Court's recognition in *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*), that discrimination against Black Americans in public education was inconsistent with the promise of equal protection did not eliminate racial discrimination or racism, as this Court's subsequent decisions attest, *e.g., United States v. Paradise*, 480 U.S. 149 (1987); *Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986); *Cooper v. Aaron*, 358 U.S. 1 (1958).

[23] *See, e.g., Fullilove* 448 U.S. at 463-467 (Burger, C.J.); *Bakke*, 438 U.S. 265, 387-96 (Marshall, J., concurring in part).

[24] *See* H.R. Rep. No. 765, 97th Cong., 2d Sess. 43 (1982); *see also* Testimony of David Honig before the FCC *en banc* AM Improvement Hearing 15 (Nov. 16, 1989) (first minority broadcast license granted in 1956; first after a comparative hearing 1975).

some 4,434 (85%) of the AM stations had likewise been awarded at that time.[25]

Notwithstanding the FCC's efforts to increase the number of minority broadcast licensees since 1978, today just over 2% of all radio and television station licenses are held by minorities.[26]

Congress specifically found that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy. . . ." H.R. Rep. 765, 97th Cong., 2d Sess. 43 (1982). The FCC was at least a "passive participant." *Croson*, 109 S. Ct. at 720 (O'Connor, J.). Its failure to recognize the effects of state-sanctioned racial discrimination in awarding broadcast licenses prior to 1978 resulted in the virtual exclusion of minority broadcast licensees.

Broadcast employment is the most direct route to ownership of a broadcast license. Yet for years the FCC gave broadcasters free rein to discriminate in employment, failing, until 1989, to find a single broadcaster guilty of employment discrimination.[27] The

---

[25] Testimony of John Payton before the United States Senate Committee on Commerce, Science and Transportation, Communications Subcommittee 21 n.31 (Sept. 15, 1989) (citations omitted).

[26] Testimony of Payton, *supra* note 25, at 2; *see* H.R. Rep. No. 765, 97th Cong. 2d Sess. 43 (1982) (as of Dec. 1981, 164 of 8,748 commercial broadcast licenses held by minorities; 32 of 1,386 noncommercial stations licenses held by minorities).

[27] This Court has held that where judicial findings of racial discrimination in employment are extensive, judicial notice is appropriate. *See United Steel Workers v. Weber*, 443 U.S. 193, (1979). The history of minority exclusion from broadcast employment has been thoroughly documented, such that judicial notice in this case is warranted. *See* U.S. Commission on Civil Rights, *Window Dressing on the Set* (1977); *National Advisory Commission on Civil Disorders*, *supra* note 18, at 383-84 (finding that in journalism in 1968, fewer than 1% of management employees were Black, most of whom worked in Black-owned organizations). Nonetheless, despite hundreds of EEO complaints, on only one occasion has the FCC found that a licensee engaged in discrimination. *Catoctin Broadcasting of New York*, 4 F.C.C. Rcd 2553, 2558, *recon. denied*, 4 F.C.C. Rcd 6312 (1989), *appealed*, D.C. Cir. No. 89-1552 (filed September 14, 1989). The D.C. Circuit has repeatedly been critical of the FCC's failure to enforce its EEO Rule. *Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C. Cir. 1988); *National Black Media Coalition v. FCC*,

FCC awarded broadcast license renewals to applicants with records of flagrant discrimination in programming.[28] It held that persons who conduct discriminatory business practices qualify for licenses,[29] even when those practices occurred in other media.[30] At times, it applied its licensing policies unevenly to the

---

775 F.2d 342 (D.C. Cir. 1985); *Bilingual Bicultural Coalition on the Mass Media v. FCC*, 595 F.2d 621 (D.C. Cir. 1978); *Black Broadcasting Coalition of Richmond v. FCC*, 556 F.2d 59 (D.C. Cir. 1977). Indeed, minority representation in professional employment in broadcasting increased only 1.1 percentage point from 1981 to 1988, from 13.9% to 15.0%. *See* FCC, *Broadcast EEO Trend Report* (1981); FCC, *Broadcast EEO Trend Report* (1988).

[28] In many instances, the FCC inaction facilitated discrimination practiced by its licensees. *See, e.g. The Columbus Broadcasting Company, Inc.*, 40 F.C.C. 641 (1965) (licensee helped incite the riot which took place at the University of Mississippi when James Meredith attempted to enroll, but FCC merely admonished the station.); *Broward County Broadcasting*, 1 Rad. Reg. 2d (P&F) 294, 296 (1963) (FCC allows threat of legal action by white citizens to prevent Florida station from addressing small portion of programming to Black community.) *Compare Lamar Life Broadcasting Co.*, 38 F.C.C. 1143 (1965), *rev'd, Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) and *Office of Communication of the United Church of Christ* v. *FCC*, 425 F.2d 543 (D.C. Cir. 1969) (FCC refused to hold hearing on Jackson, Mississippi TV licensee which operated fully segregated program schedule. After being ordered to do so, FCC held biased, one-sided hearing. The D.C. Circuit subsequently ordered FCC to deny the license renewal request).

[29] *See Chapman Radio and Television Co.*, 24 F.C.C.2d 282 (1970) (applicant, part owner of segregated cemetery, participated in decision to maintain segregation). *See also Chapman Radio and Television Co.*, 21 Rad. Reg.2d (P&F) 885, 895, 897 (Examiner 1971) (subsequent decision in which hearing examiner found that the segregation was acceptable "in the milieu of Alabama, 1971." Examiner also condoned the applicant's effort to conceal his involvement in the cemetery segregation, characterizing allegations against him as "irresponsible and only half true racism charges.")

[30] *Southland Television Co.*, 10 Rad. Reg. (P&F) 750, *recon. denied*, 20 F.C.C. 1959 (1955) (FCC found operator of segregated movie theaters qualified to hold license. Further awarded full faith and credit to Louisiana's segregation laws, one year after *Brown I*.)

detriment of minorities.[31] Moreover, the FCC routinely provided broadcast licenses to colleges and universities which were totally segregated, effectively endorsing and facilitating segregated broadcast education.[32]

Without affirmative efforts specifically directed toward increasing the number of minority licensees, white males will continue to control virtually all radio and television stations in this country for the foreseeable future. The FCC adopted the distress sale policy in 1978 only after it had become clear that its general policies encouraging diversity had failed to achieve significant minority participation. Further, the Commission found that despite its policies promoting equal employment opportunity and requiring licensees to ascertain community interests and needs, "the views of racial minorities continue[d] to be inadequately represented in the broadcast media." 68 F.C.C. 2d at 982.[33]

The distress sale policy thus recognizes that past state-sanctioned racial discrimination has all but excluded minority broadcast licensees. Because most licenses are renewed, the initial awards affect the distribution of licenses long into the

---

[31] From 1965 until 1981, the FCC applied its *Ultravision* rule to new applicants. In 1981 the Commission revoked the rule, which imposed stringent financing requirements, finding that it had inhibited minorities from obtaining licenses. *See Ultravision Broadcasting Company*, 1 F.C.C.2d 544 (1965), *repealed, New Financial Qualifications Standards for Broadcast Assignment and Transfer Applicants*, 87 F.C.C.2d 200, 201 (1981). In addition, the Commission's frequency allocations have not always been free of racial taint. *See 1360 Broadcasting Co.*, 36 F.C.C. 1478, (dissenting Statement of Joseph Nelson) (Rev. Bd. 1964) (criticizing majority's refusal to waive nighttime coverage rule for AM operator wishing to bring such coverage to Baltimore Black community when comparable requests had been routinely approved in predominately white areas).

[32] Some of the many examples include KASU-FM, Jonesboro, Arkansas, licensed to Arkansas State University in 1957; WBKY-FM, Lexington, Kentucky, licensed to the University of Kentucky in 1941; WUNC-FM, licensed to the University of North Carolina in 1952; KUHF-FM, Houston, Texas, licensed to the University of Houston in 1950; KUT-FM, licensed to the University of Texas in 1958; WTJU-FM, licensed to the University in 1957.

[33] Citing *FCC Minority Ownership Task Force, Minority Ownership Report* 1978; U.S. Commission on Civil Rights, *Window Dressing on the Set* (1977).

future.[34] Only the most well-financed Americans can even consider entering the bidding for a radio or television station in the major markets today, and very few minorities are in a position to do so. The Commission[35] and the Congress[36] have each recognized that past discrimination has inhibited minority entry into ownership. Such findings are entitled to considerable

---

[34] Most of the most valuable licenses, *e.g.*, those for VHF-TV frequencies, have long since been parcelled out, creating enormous scarcity rents. *See* Owen, Beebe and Manning, *Television Economics* 114 (1974). *See also, Central Florida Enterprises v. FCC*, 683 F.2d 503, 506-510 (D.C. Cir. 1982) (Licensee has an expectancy in renewal based upon past performance. Court noted that, as of that time, no "incumbent television station licensee ha[d] [ever] been denied renewal in a comparative hearing.")

In addition, section 310(d) of the Communications Act, 47 U.S.C. § 310(d), prevents the Commission from considering any assignee or transferee other than the one proposed by the seller. Moreover, the market for broadcasting sales is highly specialized and discreet, even more so than residential real estate since there is no "multiple list" service or industry-wide code of nondiscrimination. The day after it adopted the distress sale policy, the Commission declined to make broadcast sales public to increase minority ownership -- preferring instead to rely on policies such as the one at issue here. *Public Notice of Intent to Sell Broadcast Station*, 43 Rad. Reg.2d (P&F) 1 (1978). There is only one minority broadcast station broker in the country. Consequently, minorities frequently fail to receive notice of stations listed for sale. As a result, it has been difficult for minorities to make out a successful case of race discrimination in the sale of broadcasting stations. *See, e.g., Evening Star Ass'n.*, 67 F.C.C.2d 318, 325-330, *recon. denied*, 68 F.C.C.2d 158 (1978).

[35] *Statement of Policy of Minority Ownership*, 68 F.C.C.2d at 981.

[36] The 1982 House Conference Committee Report affirming Congress' support for the distress sale policy stated:

> [T]he effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy as well.

H.R. Conf. Rep. No. 765, *supra* note 4, at 43. Significantly, Congress explicitly relied on an FCC report, "FCC Minority Ownership Taskforce: Report on Minority Ownership in Broadcasting" (May 17, 1978) in reaching this conclusion. H.R. Conf. Rep. No. 765, *supra* note 4, at 44. This parallels Congress' use of a U.S. Civil Rights Commission Report as a major underpinning in adopting the MBE program approved in *Fullilove*, 448 U.S. at 466-67.

weight. *Fullilove*, 448 U.S. at 472; *Croson*, 109 S. Ct. at 719 (O'Connor, J.). While neither the Commission nor the Congress expressly relied on the Commission's own contributions to that history of discrimination, they both may be presumed to have been aware of the above-cited reported decisions of the agency and of its institutional history.

Given the FCC's role in the history of minority exclusion from broadcast licenses, the distress sale policy is even more reasonable. As a means to remedy prior exclusion, Congress's choice of distress sales should be sustained in these circumstances. The equal protection component of the Fifth Amendment does not require Congress or the FCC to tolerate or maintain a system that assures the preferred place of white males in the nation's economic or political institutions indefinitely.

D. The Distress Sale Policy is Narrowly Tailored to Achieve Its Objectives

The objectives of the distress sale policy cannot be achieved through the use of race neutral criteria. It was only after the failure of the general diversity policies that the FCC adopted the distress sale policy in 1978. Because of the slow turnover rate of the most lucrative broadcast properties, change in ownership patterns is very slow. Further, the need for race conscious policies reflects the effects of state-sanctioned discrimination.

The distress sale policy was implemented not to satisfy a quota, but to increase the diversity of ownership of broadcast outlets. The policy "may be invoked at the Commission's discretion only with respect to a small fraction of all broadcast licenses . . . and only when the licensee chooses to sell out at a distress price rather than go through with the hearing." *Shurberg*, 876 F. 2d at 950 (Wald, C.J., dissenting). Thus, both the FCC and the licensee exercise some control over when the policy takes effect. In addition, the sale of a station at "distress" prices does not infringe upon anyone's legitimate expectation of obtaining a license. The limited number of radio and television

frequencies means that "no one has a First Amendment right to a license." *Red Lion Broadcasting*, 395 U.S. at 389.[37] Furthermore, since the policy "lessen[s] the financial obstacles to increased minority" ownership, *Shurberg*, 876 F. 2d at 952, which are the result of discrimination that had generally excluded minority participation in the mass media, the distress sale is rationally related to the compelling interests which justify its existence.

Moreover, the FCC specifically rejected other, more restrictive alternatives when it adopted distress sales. In a ruling released the day after it adopted the distress sale policy, the Commission decided not to foster minority ownership by requiring 45-day advance public notice that a station is for sale. *Public Notice of Intent to Sell Broadcast Station*, 43 Rad. Reg. (P&F) 1 (1978). Soon afterward, the Commission rejected other minority ownership proposals originated by the Department of Commerce and advanced during the period when the Commission was considering whether to adopt the distress sale policy.[38] In 1980, the Commission considered and rejected a more expansive alternative to the distress sales — a direct set-aside of frequencies for minority ownership.[39]

The distress sale policy does not unduly burden non-minorities. "The circumstances in which distress sales arise are rare and only a small number are [sic] approved; . . . the distress sale policy . . . resulted in the transfer of only [thirty-eight] stations to minority-controlled businesses in [twelve] years,"

---

[37] *See, also, Central Florida Enterprises v. FCC*, 683 F.2d 503, 506-510 (D.C. Cir. 1982) (Licensee has an expectancy in renewal based upon past performance. Court noted that, as of that time, no "incumbent television licensee ha[d] [ever] been denied renewal in a comparative challenge.")

[38] Those proposals sought to enhance minority ownership opportunities through revisions to the Commission's comparative hearing, time brokerage, multiple ownership and related policies. *Petition for Issuance of Policy Statement or Notice of Inquiry by the National Telecommunications and Information Administration*, 69 F.C.C.2d 1591, 1593 (1978).

[39] *In the Matter of Clear Channel Broadcasting*, 78 F.C.C.2d 1345, *recon denied*, 83 F.C.C.2d 216, 218-19 (1980), *aff'd sub nom., Loyola University v. FCC*, 670 F.2d 1222 (D.C. Cir. 1982)).

which accounts for only 0.28% of all broadcast stations in the nation. *Shurberg*, 876 F. 2d at 950.

Shurberg was denied nothing it was entitled to have. The fact that it did not obtain the license it sought does not require invalidation of the distress sale policy. Only if "equal protection" requires us to maintain the status quo, and to refuse to take even the smallest steps to redress the effects of 200 years of discrimination in favor of white males, can the distress sale policy be invalidated. As this Court noted in *Wygant*, however,

> "As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy. 'When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible."

Wygant, 476 U.S. at 281 (citations omitted). The distress sale policy is limited and specifically addresses the effects of prior discrimination that effectively precluded minority ownership. In contrast, the burden suffered by Shurberg is minimal. Shurberg could have obtained the license only if the FCC decided at a comparative hearing that the license should go to Shurberg instead of to Faith Center. Astroline and any new applicant also could have competed for the license at that time. Thus, the application of the distress sale policy in this case merely removed the uncertain possibility that Shurberg might acquire a single television channel.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

Of Counsel:

Squire Padgett
1628 11th Street, N.W.
Washington, D.C. 20001

Grant David Ward
Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Suite 500
Washington, D.C. 20037
(202) 857-2937

George W. Jones, Jr.
Verna L. Williams
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006

Professor Robert Sedler
Wayne State University
School of Law
468 W. Ferry
Detroit, MI 48202

Herbert Henderson
Acting General Counsel
Brian J. Carter
Assistant General Counsel
4805 Mt. Hope Drive
Baltimore, MD 21215
(301) 358-8900
Counsel for National
Association for the
Advancement of Colored People

David E. Honig*
1800 N.W. 187th Street
Miami, FL 33056
(305) 628-3600
Counsel for Congressional
Black Caucus and the National
Black Media Coalition

Eduardo Pena
1101 Fourteenth Street, N.W.
Suite 610
Washington, D.C. 20005
(202) 371-1555
Counsel for League of
United Latin American Citizens

*Counsel of Record